

Application No. 10/809,149
Amendment dated March 14, 2007
Reply to Office Action of February 26, 2007

Independent claim 1 recites "rotatably articulating said guard about an axis that is generally perpendicular to the longitudinal axis of the spine to move said body from an open position to a closed position and said extension from an insertion position to a deployed position to move the adjacent vertebral bodies apart" (underline added for emphasis).

Cauthen teaches an insertion instrument 10 used for retraction of a nerve root away from the lumbar dural tube. Insertion instrument 10 of Figs. 1 and 2 has a handle 18 and a guide 20 extending therefrom pivotal about an articulating hinge 22. (See Cauthen, page 2, paragraphs 33-34, and Figs. 1 and 2). Furthermore, insertion instrument 10 of Figs. 13 and 14 has a handle 18 with an associated guide 20 and a handle 37 with an associated guide 35 pivotal about articulating hinges 22 and 36, respectively. (See Cauthen, pages 2-3, paragraph 37, and Figs. 13 and 14).

Retraction of the nerve root is afforded by articulating hinges 22 and 36 being pivotal about an axis generally parallel to the longitudinal axis of the spine. According to Cauthen, with reference to insertion instrument 10 of Figs. 1 and 2, "the hinged joint 22 allows simultaneous retraction of the nerve root by compressing the handle element 18 into the hollow body 12. The simultaneous retraction of the nerve root away from the lumbar dural tube allows for a safe retraction of the neural elements, eliminating the need for an independent retraction means, which would add additional bulk in a confined space, which in the present art, contributes to inappropriate compression of neural elements." (See Cauthen, page 3, paragraph 43).

To retract the neural elements, guide 20 of insertion instrument 10 of Figs. 1 and 2 pivots about an axis generally parallel to the longitudinal axis of the spine using articulating hinge 22. Furthermore, to retract the neural elements, guides 20 and 35 of insertion instrument 10 of Figs. 13 and 14 also pivot about an axis generally parallel to the longitudinal axis to the spine using articulating hinges 22 and 36. Therefore, unlike the guard of independent claim 1, guide 20 of Figs. 1 and 2, and guides 20 and 35 of

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Figs. 13 and 14 do not pivot about an axis generally perpendicular to the longitudinal axis of the spine. As such, Cauthen does not teach or suggest a method as recited in independent claim 1, and Applicant submits that the rejection under 35 U.S.C. § 102(e) has been overcome.

The Examiner rejected claim 3 under 35 U.S.C. § 103(a) as being unpatentable over Cauthen in view of US 5,860,973 to Michelson; rejected claim 24 under 35 U.S.C. § 103(a) as being unpatentable over Cauthen in view of U.S. Patent No. 6,190,414 to Young ("Young"); rejected claims 20, 23, 32-36, 40, 41-43 under 35 U.S.C. § 103(a) as being unpatentable over Cauthen in view of U.S. Patent No. 6,210,412 to ("Michelson '412"); rejected claim 31 under 35 U.S.C. § 103(a) as being unpatentable over Cauthen in view of U.S. Patent No. 5,876,457 to Picha ("Picha"); rejected claim 38 under 35 U.S.C. § 103(a) as being unpatentable over Cauthen in view of U.S. Publication No. 2003/0023209 Gruskin ("Gruskin"); and rejected claim 39 under 35 U.S.C. § 103(a) as being unpatentable over Cauthen in view of U.S. Publication No. 2003/0229401 Mansouri ("Mansouri"). Applicant submits that the rejections over claims 3, 20, 23, 24, 31-36, 38-43, are rendered moot at least because they depend from an allowable independent claim, or claims dependent therefrom.

Applicant submits that independent claim 1 is patentable and that dependent claims 2-44 dependent from independent claim 1, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.

In view of the foregoing remarks, it is respectfully submitted that the claims are patentable. Therefore, it is requested that the Examiner reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees

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required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

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